(26,089)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 622.

DONATTO FILLIPPON, PETITIONER,

vs.

ALBION VEIN SLATE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Certified Copy.

TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. —.

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Office Supreme Court U. S. Filed Aug. 13, 1917. James D. Maher, Clerk.

1

Docket Entries.

In the District Court of the United States, Eastern District of Pennsylvania.

3636.

DONATTO FILLIPPON

vs.

ALBION VEIN SLATE COMPANY.

Smith, Paff & Laub.
F. P. Prichard.

1915.	May	10.	Præcipe for summons filed.
			Summons exit returnable the first Monday of June next.
			Statement of claim filed.
			Rule to plead filed.
			Summons returned "served" and filed.
"	June	8.	Order for the appearance of Frank P. Prichard, Esq., for defendant filed.
1916.	April	19.	Plea filed.
			Order to place case on trial list filed.
"	Oct.	9.	Jury called.
"	"	10.	Verdict for defendant.
"	"	13.	Motion and reasons for new trial filed.
"	"	30.	Bill of Exceptions filed.
"	Nov.	3.	Order of Court sealing Bill of Exceptions.
"	"	27.	Argued sur motion for new trial.

2

" Dec. 6. Opinion Witmer, J., denying motion for new trial filed.
" " 21. Præcipe for judgment filed. Judgment accordingly.
1917. Jan. '18. Petition for Writ of Error filed.
Order of Court allowing Writ of Error filed.
Assignments of Error filed.
Bond for costs sur Writ of Error filed.
Order of Court approving bond sur Writ of Error filed.
Writ of Error allowed and issued and copy thereof lodged in clerk's office for adverse party.
Citation allowed and issued.
Præcipe sur Transcript of Record filed.
" " 20. Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Donatto Fillippon, plaintiff, and Albion Vein Slate Company, a manifest error hath happened, to the great damage of the said Donatto Fillippon, plaintiff, as by his com-
3 plaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States at Philadelphia, the 18th day of January, in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before WITMER, *J.*

Allowed by:
THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

4 In the District Court of the United States for the Eastern District of Pennsylvania. March Sessions, 1915.

No. 3636.

DONATTO FILLIPPON

vs.

ALBION VEIN SLATE COMPANY.

Statement of Plaintiff's Claim.

Filed May 10, 1915.

The above-named plaintiff claims of the above-named defendant the sum of Ten Thousand Dollars ($10,000.00) damages upon a cause of action of which the following is a statement:

First. That Donatto Fillippon, the plaintiff above named, is and was at all times hereinafter mentioned in this statement, a citizen of the Kingdom of Italy and a subject of the King of Italy.

Second. That the Albion Vein Slate Company, the defendant above named, is and was at all times hereinafter mentioned in this statement, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having its plant at or near the Borough of Pen Argyl, in the County of Northampton and State of Pennsylvania, and its principal place of business in the Borough of Bangor, County of Northampton and State of Pennsylvania, and in the Eastern District thereof.

Third. That on or about the 31st day of July, A. D. 1914, and for a considerable period of time prior and subsequent thereto, the defendant corporation was engaged in the mining and quarry-
5 ing of slate and slate products and in the manufacture of same, and operated a slate quarry near the Borough of Pen Argyl, in the County of Northampton and State of Pennsylvania.

Fourth. That on or about, to wit, the 31st day of July, A. D. 1914, and for some time prior thereto, the plaintiff, was employed by the defendant company as a rubbish hand, the duties of which employment consisted of loading rubbish in "boxes" preparatory to hoisting same out of the quarry or hole and depositing same on the outside.

Fifth. That it was the duty of the defendant company to furnish a reasonably safe place to work; to warn and instruct the employees as to any and all latent dangers, as well as to any defects in methods, appliances and machinery, of which the employees could not have been held to have had notice, or which were not apparent to them; to reasonably guard against such dangers and take all the necessary precautions against any dangers, of which the employer had superior knowledge; that it was the duty of the defendant company to use such methods, appliances and machinery as were in common and ordinary use by those in the same line of business and not more dangerous, and that it was the duty of the defendant company to

apprise its employees of dangers, which, though not imminently dangerous, were known to the defendant and not known to the plaintiff.

Sixth. That disregarding these duties as aforesaid, the defendant, on or about, to wit, the 31st day of July, A. D. 1914, carelessly and negligently employed methods, means, instrumentalities and machinery not in common and ordinary use, but more dangerous than those in common and ordinary use, in that the defendant in
6 preparing blocks of slate for manufacture into a commercial product, instead of using props and levers at the proper and necessary points under the block of sufficient size and strength to maintain and support the block while raising same, used a wedge, which alone is not used, designed or intended for the purpose of supporting the block, by and because of the use of which improper, defective and negligent method or instrumentality the plaintiff, who had been directed to place the wedge under the block, and while he had his arm under the block to push the wedge under same as a support for the block of slate, and while he was in the act of pushing the wedge under the said piece of slate as he had been directed to do by his superior, the said block of slate, because of the inadequate and insufficient and improper support afforded by the using of the wedge instead of a sufficient and proper support, tilted and mashed the plaintiff's right arm near the elbow.

Seventh. That disregarding the duties imposed upon it by law, the defendant company, to wit, on or about the 31st day of July, A. D. 1914, failed to warn the plaintiff of the latent dangers due to the use of the insufficient instrumentality and the dangerous method not in common and ordinary use by others in the same line of business, and failed to instruct the plaintiff of the dangers to which he was subjected by the use of a defective and improper method and instrumentality, and failed to fully apprise and warn the plaintiff of the dangers to which he was subjected by his employment.

Eighth. That the defendant, disregarding its duty, on the said 31st day of July, A. D. 1914, transferred the plaintiff from the duties for which he had been employed and with the risks of which he was familiar, and directed him to work at a place, with the risks
7 of which employment he was not familiar, and of which dangers and risks he had not received any instruction or warning, in that the plaintiff on or about, to wit, the said 31st day of July, A. D. 1914, was taken from his employment, which was that of loading rubbish into boxes, and set to work at a more dangerous employment, which was that of putting the support under blocks of slate for the purpose of giving sufficient room under the block, and which part of the operation of a slate quarry requires experienced and specially instructed employees to guard against the latent dangers of such employment.

Ninth. That the defendant, disregarding its duty, still further, to wit, on the said 31st day of July, A. D. 1914, ordered and directed the plaintiff, an uninstructed and inexperienced employee, to do the work in the manner said work was performed by the plaintiff and under the direct orders and instructions of the defendant, by yielding to the superior judgment of the defendant, to whose orders and directions the plaintiff was bound to yield and conform.

Tenth. That by reason of and because of the aforesaid negligent and careless acts of the defendant, and without any negligence on his part, the plaintiff, while in the employ of the defendant and in the performance of the new and unfamiliar duties of his employment without warning and instruction under the direct orders of his superiors, was injured on the said 31st day of July, A. D. 1914, by the tilting of the block of slate while in the act of setting a support for the block of slate so that the plaintiff's arm was crushed at or near the elbow, which necessitated the amputation of the arm above the elbow, so that the plaintiff is permanently disabled and prevented from earning a livelihood for himself, and has resulted in great pain and suffering to the plaintiff and in his physical disfigure-
8 ment, to the plaintiff's damage in the sum of Ten Thousand Dollars ($10,000.00), which the plaintiff seeks to recover in this action.

All of which the plaintiff expects to be able to prove at the time of the trial of this case.

DONATTO FILLIPPON.

STATE OF PENNSYLVANIA,
County of Northampton, ss:

Donatto Fillippon, the plaintiff above named, being duly sworn according to law, deposes and says that the facts set forth in the foregoing statement are true and correct as he verily believes.

DONATTO FILLIPPON.

Sworn and subscribed before me this 8th day of May, A. D. 1915.

[SEAL.] J. E. STRAUB,
Fifth Ward, Easton,
Alderman Northampton Co., Pa.

My commission expires First Monday of Jan., 1918.

Plea.

Filed April 19, 1916.

The defendant in the above case pleads "Not Guilty."

FRANK P. PRICHARD,
Attorney for Defendant,
Per JOSEPH NEFF EWING.

To Clerk U. S. District Court, April 18th, 1916.

9 *Bill of Exceptions.*

Filed Oct. 30, 1916.

Be it remembered, that in the term of March Sessions, A. D. 1915, came the said plaintiff into the said Court and impleaded the said

defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the City of Philadelphia aforesaid, before the Honorable C. B. Witmer, Judge of the said Court, on Monday, the ninth day of October, A. D. 1916, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff and defendant offered the following evidence:—

PHILADELPHIA, PA., Monday, October 9, 1916.

Before Hon. Charles B. Witmer, J., specially presiding.

Present:

Calvin F. Smith, Esq., and J. Willard Paff, Esq., representing the plaintiff.

Frank P. Prichard, Esq., representing the defendant.

10 Transcript of Testimony, rulings of the Court, and Exceptions.

Jurors sworn and affirmed Monday, October 9, 1916.

Mr. Paff opened the case on behalf of the plaintiff.

Mr. Prichard opened the case on behalf of the defendant.

At 12.45 p. m. a recess was taken until 1.30 p. m.

1.30 p. m.

Present: Parties as before noted.

Plaintiff's Evidence.

Mr. Paff: I would like to call Mr. Pasana to act as interpreter.

MARIO PASANA, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Are you an official interpreter?
A. No, I am not.
Q. What is your business?
A. I am a law clerk.
Q. You are connected with what office?
A. With a firm of lawyers in New York City.

Q. You come from New York?
A. Yes.
Q. You live in New York?
A. Yes, I live in New York.
Q. Are you interested in this case at all?
11 A. No, I am not.
Q. How do you come to be an interpreter here?
A. He (plaintiff) came first to our office. I was the interpreter from the beginning to now for him.
Q. You mean your office? You mean he came to your office in New York, for your office to take the case? He came to your office in New York, to take the case?
A. Yes, exactly.
Q. Is your office still interested in the case?
A. No, it is not.

Mr. Prichard: I would like to have an official interpreter if I could have one. I do not like to have an interpreter connected with the parties, who might be more or less interested. I do not mean to cast any aspersions on this gentleman, for I do not know him at all. The witness has been in this country for two years and a half, I understand. Perhaps he speaks English.

Mr. Paff: Not very well.

Mr. Prichard: I have not been able to get hold of an official interpreter. I do not want to delay the Court. We will go ahead with this man, but I will ask your Honor to caution him to repeat exactly what the witness says, not a free translation, but an actual translation.

The Court: Very well. Isn't the plaintiff able to speak any English whatever?

Mr. Smith: I think very little.

Mr. Paff: Very little.

The Court: When it comes to the important part of the case, let the plaintiff answer in English, if possible. Of course, if he cannot get along that way, we will help him.

Mr. Prichard: My information was that the plaintiff spoke
12 broken English. He has been in the country for two years and a half. My information is that he speaks broken English.

The Court: He can do a little bit in that direction. When it comes to the important part of the case, let him answer in English, if possible.

DONATTO FILLIPPON, the plaintiff, sworn and examined through the interpreter, as follows:

By Mr. Paff:

Q. How old are you?
A. Twenty-three.
Q. Where were you born?
A. Over in Italy.
Q. What part of Italy?
A. The northern part of Italy.

Q. Were your parents born in the northern part of Italy? Were your father and mother born in Italy?
A. Yes.
Q. When did you come to America?

By the Court:

Q. How many years ago?
A. Four years ago.
Q. You are in this country four years? How many years are you here in the United States?
A. I came in November or December, about the 16th of December.
Q. What year? How many years ago?
A. Oh, about four years.

By Mr. Paff:

Q. Where did you go to after you came to America? When you came to America, where did you go to in America?
A. Pen Argyl.
Q. When did you go to Pen Argyl?
A. To see my brother.
Q. When?

13 By the Court:

Q. What year?
A. About four years, pretty soon.

By Mr. Paff:

Q. About four years pretty soon?
A. Yes.
Q. What did you do when you came to Pen Argyl?
A. Working.
Q. Working where?
A. In the quarry.
Q. What quarry? Which quarry?
A. Jackson-Bangor.
Q. Is that a slate quarry?
A. Yes.
Q. How soon after you came to Pen Argyl did you begin to work?
A. Oh, about three or four months.
Q. Then you worked at Jackson-Bangor?
A. Yes.
Q. How long did you work there?
A. Three or four months.
Q. Now, I want to see if you understood my first question. How long was it after you came to see your brother at Pen Argyl that you began to work in the quarry?
A. The day after.
Q. The day after you came. And you worked in the Jackson-Bangor quarry how long?
A. About four months.
Q. Then what did you do?

A. I was a rubbish hand.
Q. You were a rubbish hand at Jackson-Bangor?
A. Yes.
Q. After you left Jackson-Bangor Slate Quarry, where did you go?
A. Albion Vein Slate Company.
Q. How long did you work there?
A. Oh, about a year and three or four months.
14 Q. You worked there until the time of this accident, did you? You worked there until the time of your injury to your arm?
A. Yes.
Q. All the time. Did you work there all the time?
A. Yes.
Q. Every day?
A. Yes.
Q. Sunday?
A. Oh, no. One time on Sunday.
Q. What did you do there?
A. Worked on top of the hole.

By the Court:

Q. At first, when you came there, what did you do?
A. The same work.

By Mr. Paff:

Q. That which you did at Jackson-Bangor?
A. Yes.
Q. At Jackson-Bangor, did you handle the rubbish on the bank or in the hole?
A. In the hole.
Q. Then you came to the Albion Vein Slate Company and handled rubbish in the hole?
A. Yes, sir.
Q. Do you remember on or about July 31, 1914?
A. Yes.
Q. Where were you working on that day? On the day that this injury happened to your arm, where were you working?
A. With Humphrey Davis.
Q. Who was Humphrey Davis?
A. The block man.
Q. In what part of the hole, of the quarry hole, was Humphrey Davis, the block man?
A. The Albion Vein Slate Company.
Q. In what part of the hole?
A. No. 4.
15 Q. What do you mean by No. 4?
A. No. 4 was the place where I was working.
Q. So that there were different places in the hole designated by number?
A. Every place is numbered.
Q. Did Humphrey Davis work at all the numbers, or only No. 4?

A. He was working at the different numbers, but this day he was working at No. 4.
Q. At No. 4?
A. Yes.
Q. Where were you working that day?
A. With him.
Q. What were you doing?
A. Rubbish man.
Q. What does that consist of?
A. To load the boxes with small stone, of small rocks, and to put the wedge under the stone.
Q. Loading boxes with rubbish?

Mr. Prichard: And putting the wedges under the stone.
Mr. Paff: I am going to come to that. I will take that up separately.

By Mr. Paff:

Q. Where did the rubbish come from that you put in the boxes?
A. They do that. They make the rubbish.
Q. How?
A. After blasting.
Q. After blasting. Now, what did Humphrey Davis say to you?
A. He told me to take the wedge and put under the stone.
Q. Were you there at the stone when he asked you or were you called from some other place near by?
A. I was near by.
Q. How far away?
16 A. To load the box.
Q. How far away were you?
A. About three or four feet.
Q. Three or four feet?
A. Yes.
Q. Away from the place?
A. Yes.
Q. What was Humphrey Davis doing there?
A. He was moving the stone.
Q. How?
A. He had to split the rock and the bar was lifting.
Q. Lifting it up. Was anyone helping him do that?
A. His son.
Q. How large was this block that they were lifting?
A. You mean how long?
Q. How long and how wide and how thick?
A. About five feet long, four feet wide.
Q. How thick?
A. About six or seven inches.
Q. Six or seven inches thick?
A. Yes.
Q. How was the rock under this rock or stone that they were lifting, with reference to being level, or did it have a dip?
A. It was inclined to one side.
Q. About how much? Indicate with that book.

A. About like that (indicating with book).
Q. What did Humphrey Davis say to you then?
A. He told me to put this wedge under the rock.
Q. Who called you to come over to the stone for that purpose?
A. Humphrey Davis.
Q. What did Humphrey Davis say to you?
A. He told me to put the wedge under the stone.
Q. Describe the wedge. What was it?
A. It is like a rail, that is finished by an angle.
Q. What kind of a rail?
A. Like the railroad rails.
Q. Like railroad rails. How long was it?
17 A. It was about one foot long.
Q. One foot long. How thick?
A. About four or five inches thick.
Q. Tell us about what you did with that wedge?
A. I put it under the stone to lift it up.
Q. What is that?
A. I put it under the stone to lift it up.
Q. How far under the stone?
A. About like that (indicating about five or six inches).
Q. What was said to you, or what did you say?
A. I put this wedge under the rock and I got scared, being the largest stone, and I want him to get something to push the wedge under the stone, and he told me to go ahead, put the stile under the stone.
Q. Or wedge?
A. Wedge.
Q. What did you say to Humphrey Davis about getting something?
A. I told him I was afraid to put the stile under there.
Q. What did he say?
A. He told me to go ahead and put the stile under there.
Q. And was anything else said?
A. No, he did not say anything else.
Q. Nothing else?
A. No.
Q. Then what happened?
A. Then the rock fell on my arm.
Q. It fell on your arm?
A. Yes.
Q. At what point? On which arm? The right arm or left arm?
A. On the right arm.
Q. On the right arm?
A. Yes.
Q. At what point?
18 A. Near the elbow.
Q. Then what happened?
A. And the rock started to slide down on my arm.
Q. The rock started to slide down on your arm. How far?
A. Well, up to the muscles.
Q. Did you say to Humphrey Davis you were afraid before you put your arm in under, or after you put your arm in under?

A. After that I put a little bit the wedge under the stone.
Q. After you put it a little bit under the stone. Did you take your arm out, then ask to get something, as you said?
A. Yes, I want to go and get something. I want to go and get something.
Q. And was it then that Humphrey Davis said you should put it under?
A. Then he say, "Go ahead, go ahead, put under the stile".
Q. Where were you taken after that?
A. After they took me out from the rock, they put a handkerchief around the arm to stop the blood.
Q. Whereabouts?
A. There. (Witness points to about three inches below the arm pit.) This is the place where the arm was amputated.
Q. Describe just how your arm was at the point three or four inches below the arm pit?
A. All the flesh there was smashed and torn down.
Q. How about the bone?
A. The bone was all right, but all the arm was open, all the flesh was open. The bone was all right.
Q. The bone was not broken?
A. No, it was not.
Q. Then where were you taken?
A. They placed me in the box and lifted me up.
Q. They placed you in a box?
19 A. Yes, in a box and lifted me up.
Q. Was this one of the boxes in which they took the rubbish upon this table?
A. Yes.
Q. And they took you up where?
A. They took me over near the office.
Q. Over near the office?
A. Yes.
Q. Is the office on the slate quarry property?
A. Yes.
Q. What happened there?
A. They wanted me taken inside the office, and after that they left me outside.
Q. Afterward they left you on the outside?
A. Yes.
Q. Why did they leave you on the outside?
A. I don't know. Probably because the office would get dirty with the blood.
Q. Where were you taken then?
A. The doctor came over, and they took me home.
Q. What doctor?
A. Dr. McCormick.
Q. Did he take you to your home?
A. To the home of my brother.
Q. To the home of your brother?
A. Yes.
Q. What happened there?
A. He sewed my arm.

Q. He sewed the arm?
A. Yes.
Q. Did that cause any pain?
A. Sure I feel pain.
Q. You felt pain?
A. Yes.
Q. Very much?
A. It certainly was great pain.
Q. Was it painful at the time of the accident?
A. It was a pain that I could not forbear. It was about
20 the same when the accident happened as when the stitches were put on my arm.
Q. What happened after the stitches were put in your arm?
A. Then they left me on the bed.
Q. How long?
A. About six days.
Q. About six days?
A. Yes.
Q. What happened during that time?
A. The doctor thought that he was able to save my arm, and he was coming to treat me, and the pain was every day worse.
Q. What happened then to your arm?
A. They took me over to the hospital. They told me that it was necessary to amputate the arm.
Q. They told you that at the hospital?
A. Yes.
Q. How was the arm as regards color before they took you over?
A. It was all black, and it was big.
Q. And then you say the doctor said he would have to take off the arm?
A. They told me that it was necessary to amputate, otherwise I was going to die.
Q. Did they take it off?
A. They told me they would cut the arm one day or two afterward, they will wait for my brother to come over.
Q. Did they take it off when your brother came over, then?
A. Yes, they did.
Q. Stand up and show the jury where it was taken off.
A. Right here (indicating).
Q. How much did you earn per day while you were working? How much?
A. $1.80 a day.
21 Q. Did you earn that during the entire time that you worked for the Albion Vein Slate Company?
A. Yes.
Q. What was the condition of your health before the accident and while you were employed?
A. It was good. I was working every day making $1.80.
Q. You were working every day making $1.80?
A. Yes.
Q. Did you use alcohol?
A. No, I never drink alcohol.
Q. And you worked every day?

A. Yes.
Q. Coming back to this No. 4 in the quarry hole, did Humphrey Davis give you orders there at different times to work?
A. Yes. I got to do it. It was my duty.
Q. It was your duty?
A. I had to obey.
Q. You had to obey?
A. I had to obey him.
Q. Humphrey Davis?
A. Humphrey Davis, yes.
Q. And did you obey the orders and directions of Humphrey Davis?
A. Yes, also the others.
Q. And did others also obey orders of Humphrey Davis, the rubbish hands?
A. Yes, they were obeying when they were working under him, as myself.
Q. When they were working under him as yourself doing what?
A. Possibly one week or two, one week or two.
Q. While they were doing what in the quarry? Working in the rubbish, or what?
A. To do all kind of work, to place this piece of iron, as I said before.
Q. Did you see him at that time giving orders to other workmen, too?
22 A. Yes, those that are working under him.
Q. And he was the only one who gave orders, then, on this particular day of the injury?
A. Yes.
Q. What work did you do after the accident, or after the injury?
A. Nothing. I am unable to work.
Q. Are you doing anything now?
A. No; I cannot.
Q. Do you have any education? Do you read and write?
A. When I had my arm on I could write and also read, but now I am unable to read.
Q. You have not been able to read since that time?
A. No.
Q. Do you write? Can you write?
A. I was able to read and write before the accident, but after the accident I am unable to write and even unable to read.
Q. How do you explain your inability to read or write?
A. I cannot write with the left hand.
Q. How about your inability to read?
A. I read only Italian.
Q. Do you suffer any or have you suffered any since the time of the accident in the stump of the right arm?
A. Even now I feel pain, and piece of bone was removed this year.
Q. Even now you feel pain?
A. Yes.
Q. And a piece of bone was removed this year?
A. Yes.
Q. Where was that removed?

A. In the arm.
Q. By whom?
A. Dr. McCormick.
Q. Of Pen Argyl?
A. Yes.

23 Cross-examination.

By Mr. Prichard:

Q. Part of your work as rubbish hand was putting these wedges or stiles under the stone in order that a chain could be put round them, was it not?
A. My work is to put the wedge under the rock.
Q. You had been doing that ever since you had been at the quarry, had you not?
A. Yes.
Q. Is this wedge that I show you the kind of wedge that you used? (Wedge produced and shown witness.)
A. I cannot say if it is the same one that I was using. They are all about the same.
Q. I am not asking you whether it is the same one. But it is like it? I do not know whether it is the same one myself.
A. About the same size.
Q. Did you tell Mr. Humphrey Davis that you were afraid to put that under?
A. Yes, after I put it a little bit inside I got scared and I told him, and the stone was very large.
Q. How far under the stone was the wedge when you told him you were afraid?
A. It was probably all under, but my hand was still outside the stone.
Q. Why were you afraid?
A. I saw that stone was a large one, and I was afraid to put my arm under.
Q. What were you afraid of?
A. I was afraid to put the piece of iron under.
Q. What were you afraid would happen?
A. The rock was like to fall on my arm.
Q. Did you tell Humphrey Davis you wanted to go after something to shove it under?
A. Yes, I told him, and he told me, "Go ahead, put under the stile, put under the stile".
Q. Just give the words that you used, as nearly as you can recollect them.
24 A. "Get him something to put in the stile."
Q. Please repeat, as near as possible, just what you said to Humphrey Davis. Use the words as nearly as you can recollect them.
A. That is all Humphrey Davis has said. "Go ahead, go ahead".

By the Court:

Q. Mr. Prichard is asking you now what you said to Humphrey Davis, your exact words.

A. Get something for to put in the stile, on the block.

By Mr. Prichard:

Q. What had you usually used before to put the wedge under?
A. I was using sometimes a hook, and also the shovel.
Q. What was the first?
A. A hook and a shovel.
Q. Sometimes a shovel?
A. A shovel.
Q. The hook is a long pole, is it not, with a hook on the end?
A. They are different sizes. Some is as long as a shovel.
Q. You used the handle of a shovel, didn't you?
A. Yes.
Q. Why did you use those things, then, instead of your hand?
A. He told me to go put in the stile, in the block.
Q. On the other occasions, the previous occasions, why did you use the shovel and the pole, instead of your hand?
A. Every time that there was a larger stone.
Q. Why did you use the shovel instead of your hand on these previous occasions for the large stones?
A. Because the stone was very wide, and it is necessary to put an arm under a little ways.
Q. Why did you use the shovel and the pole instead of
25 putting your arm under on these previous occasions?
A. Because when the rock is wide, and you have to go under with the arm, then you use a shovel and the pole, but when it is small, only a foot or two, then you put under with the hand.
Q. Then on this particular occasion, why were you afraid to use your arm? The wedge was not very far in, was it?
A. I was afraid, because if I lose my arm, then I got no more.
Q. Had you put your arm in on the previous occasions?
A. When it was a small rock I put my hand.
Q. When it was a large rock did you put your hand in before?
A. They ordered me to use something, and I was always using it. They ordered me to use something, and I was always using it.
Q. You were always to use it, and they told you, didn't they, not to put your arm in on these previous occasions?
A. Yes, and I was doing what they told me to do.
Q. Did they tell you why you must not put your arm in?
A. If the rock was a large one, I was told to get something.
Q. They told you it was dangerous to put your arm in, didn't they?
A. Yes, sure.
Q. Do you recollect that on one occasion Mr. Hooper found you putting your arm under the rock, and he grabbed you and pulled you out, and told you it was dangerous?
A. No. Probably he was joking, and he took me by the hair, and he was taking the tobacco from my pocket, just for fun.
Q. You remember his taking you by the hair, don't you?
26 A. Yes, just joking.
Q. And you had your arm under the stone at that time, had you not?
A. No.

Q. You did not have your arm under the stone?
A. No.
Q. After the accident, did not the superintendent of the Albion Vein Quarry Company offer you employment, and didn't you refuse? After the accident, did not the superintendent of the Albion Vein Slate Company offer you employment, and didn't you refuse? He offered to employ you, offered to hire you, give you a job?
A. Yes, they did, but how can I do it? They did, but how could I do it? How could I do it, the job?
Q. You refused, didn't you?
A. I am unable to work. That is why I refused.
Q. Didn't he offer to give you a job that you could perform?
A. He told me that they are willing to give a job to me. I don't know what kind of a job they will give me.
Q. Didn't you ask what kind of a job they will give you?
A. No, I did not.

Redirect examination.

By Mr. Paff:

Q. Was there anything said about signing a paper at the time that job was offered?
A. Yes, they told me I had to sign something.
Q. And what did you say about that?
A. He offered me $200, and after that he offered me $250 and the job.
Q. If you did what?
A. He told me he was willing to give me a job and $250, but I don't know what kind of a job.
Q. You were asked on cross-examination why you put this
27 under. What was the purport of putting it under the rock?
A. To split the rocks so they could put the chain under and lift it up.
Q. This iron hook that they were talking about, was that iron hook not used to pull the chain through after the rock was split apart?
A. Yes, and also to put the wedge under.
Q. Also to put the wedge under?
A. Yes.

Recross-examination.

By Mr. Prichard:

Q. I would like to ask you one other question. Do you mean to say that at this interview, where the superintendent offered you employment, that he made any condition whatever as to signing any paper?
A. Sure.
Q. All right.
A. He had the paper in his pocket, he wanted to pull it out, to be signed.

Mr. Paff: If the Court please, my colleague and I come from

Easton. We are residents of Easton. We assumed when we got here we could find the mortality tables in the Court House, and we have been trying to get them since a short time after adjournment, and we would like to have permission to put them in at the end of the case.

Mr. Prichard: I have no objection to that, sir.

Mr. Paff: With that we rest.

Plaintiff rests.

Counsel for defendant moved for a non-suit.

At 3 o'clock p. m. Court adjourned until Tuesday, October 10, 1916, at 10 o'clock a. m.

28 PHILADELPHIA, PA., Tuesday, October 10, 1916—10 a. m.

Present: Parties as before noted.

Motion for non-suit overruled.

Mr. Smith: I desire to offer in evidence the present mortality tables, showing the expectancy of life at twenty-three to be 39.31 years, and at twenty-one, 40.75 years.

The Court: Which is it?

Mr. Smith: At twenty-one, it is 40.75, and at twenty-three it is 39.31. His testimony was that he is now twenty-three years of age, and at the time of the accident he would be twenty-one.

Plaintiff closes.

Defendant's Evidence.

ALEXANDER MCKENNA, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you reside?

A. In Pen Argyl, Pennsylvania.

Q. You are the Superintendent of the Albion Vein Slate Company, the defendant in this case?

A. I was, yes.

Q. You are not now in their employ?

A. No, sir.

Q. During what times were you in their employ?

A. I have been in their employ from 1912 up until the present year, in June.

Q. From 1912 down to 1916—June, 1916?

29 A. Yes, sir.

Q. You were the Superintendent in the quarry, therefore, at the time of this accident?

A. Yes, sir.

Q. You have been how long a quarryman?

A. How long?

Q. Yes.

A. I went in the slate business when I was aged 14.

Q. Will you tell the Court and Jury what was the organization of this quarry? Who was at the head of it, I mean the work. You were the superintendent?

A. Yes, sir.

Q. Then, who were under you?

A. There was nobody under me in managing the quarry.

Q. And how many gangs of men were there?

A. I had five cables around me,—ropes, in other words, and with different gangs to each rope. As a rule, four men, four quarrymen, to each rope, and supposed to be two rubbish hands, or laboring hands, in other words, but at this time only one to each rope, owing to the scarcity of labor.

Q. One rubbish hand?

A. Yes, sir.

Q. How many other men besides the laborer were at that rope?

A. Four men as a rule. They vary sometimes, but three to four, but four in this case.

Q. What were the duties of the various men in the gang?

A. The duties of the quarrymen were to quarry out the blocks for the manufacturing of slate.

Q. The duty of the laborer or rubbish man, as you call him, was what?

A. To obey the call of these men that were quarrying out the slate, whatever they demanded of them to do.

Q. Won't you tell the jury in your own way,—or, first, let me ask you, was it part of the duty of this rubbish man to put the wedges under the stone?

A. Yes, sir.

Q. Why were those wedges put under the stone?

A. In order to get the chain round to hoist the block up.

Q. Will you just tell the Court and jury how these slates were quarried out?

A. Well, these slates are quarried out, if none of you have ever seen a slate quarry, it is an open hole from the surface down, it is quarried down, and we go down so far before we come in contact with good slate, material for making roofing slate, or mill stock, or for blackboards, then when we come to that place where we can make either roofing or mill stock or blackboards, we are more careful about the handling of the slate, it is handled in a more mechanical way, blasted very light, in order to get it out solid, and we use very small steels, about the size of my finger, probably a little bigger, in order to get in what we call a light blast, that is, a fine blast, in order to get it out solid. These quarrymen are supposed to handle this. When we come to that place we use the steam drills, or the jack hammers would be used, with the adze for that purpose, and we cut into a drift, the open drift on the side, we cut it in there eight to ten feet, and it may be thirty to thirty-five to forty feet long, as the case may be. We go in by joints. Then, those drifts are carried in from one side of the quarry to the other. For instance, in this case there was No. 5 cable to carry those drifts so far, then No. 4 would take hold of them and carry them so far over to No. 3, until we reach No. 1. Each gang or

each rope was supposed to carry a piece that far, then the other gang would follow on, and in this case the party that was working on this No. 4 rope, there was a blast made, and when the blast was made they started to split the stone up. The stone is split the same as
31 you put a chisel in under this book here (illustrating with book), and then raise it up with a hammer and the chisels, where the wedge is put in, then they use a crow-bar in order to ply it open, and they shove in the wedge, a small wedge first, and then when they get the small wedges as far as is necessary to put them in, they use these big wedges, or what we call the stiler irons.

Q. This model that has been produced here is the kind?

A. Yes. If you will pardon me for using that, that is put under the block, and it is supposed to go in so that the chain will go around the end here (indicating), in order to raise this block up. At times we use two chains, one small chain, so as to raise it up, in order to use the big chain, if it is a heavy piece. If not, the small chain will carry it to the surface. But as a rule we use two chains for safety. The small chain is used to raise it up, then the big chain is put around it in order to carry it up to the surface, to get to manufacturing of the slate. That is practically the way the slate is handled.

Q. How is the big wedge that you hold in your hand pushed under the stone?

A. It is pushed in as a rule that far (indicating). Then it is at this end (indicating). They are supposed then to take a stick or a hammer or an iron and push this in. They are not supposed to use their hand, at no time under any conditions are they supposed to use their hand in order to push this in. I always made it a point in my life to instruct the labor hands and all men to be careful, in using such things, in handling, not to use their hands.

Q. You were at the quarry at the time of the accident, were you not?

A. I was; yes, sir.

Q. Where were you?

A. I was on the top at the time of the accident.

Q. Up on the bank?

A. Yes, sir.

Q. Therefore, you did not see the accident actually happen?

32 A. No, sir; I did not.

Q. Mr. Fillippon, the plaintiff, has said that you offered him employment after the accident, but you accompanied it with the condition that he would sign some paper. Is that so?

A. Positively not.

Q. Just state what did occur?

A. I was seeing this young man pretty near daily, being in the same town, and I always had sympathy for him, because he was a good little worker, and I thought a lot of him while he was working, he was active, and always energetic, willing to do whatever I would ask him to do, and I had sympathy for him, and going around doing nothing, I offered him employment that I thought he could do, that I knew men of similar character had been doing, and I was told that he was suffering in a way that he could not do it, but under no conditions did I ask him to sign a paper or anything else.

Q. What did he say when you offered him employment?

A. In fact, the company did not know that I made the offer to him, none of the company was aware of the fact that I made an offer to him of a job.

Q. What did he say when you made the offer?

A. He said he was not able to do it.

By the Court:

Q. He said what?

A. He said he was not able to do it.

By Mr. Prichard:

Q. And did he ever come to apply for employment after that time?

A. Sir?

Q. Did he ever apply to you for employment after that time?

A. No, sir; he did not.

(No cross-examination.)

33 HUMPHREY DAVIS, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you live?

A. Wind Gap.

Q. Are you in the employ of the Albion Vein Slate Company?

A. Yes, sir.

Q. You are in their employ now?

A. Not now, no, sir. I am in Easton now.

Q. Where are you employed now?

A. Easton.

Q. You were in the employ of the Albion Vein Slate Company at the time of the accident, were you?

A. Yes, sir.

Q. What was your position there?

A. Taking off the blocks. Block man, they call it.

Q. Mr. Fillipon has said that you and your son were lifting up the rock with crow-bars, and that you told him to put in a wedge, and then he told you that he was afraid, that he wanted to get something, that he was afraid to push it in without something to push it with, and you told him to go ahead. Please state what did occur?

A. I told him to wedge this block for me. He took a little wedge first, until he had it high enough to put the big wedge in, and after I told him to put the big wedge in, and he put it in.

Q. Did he tell you he was afraid to do it?

A. I cannot recall that now.

Q. Did he ask you to get something to push the wedge under?

A. No, sir; there was nothing there.

Q. Did he ask to go to get something, or ask you to go to get something?

A. No, sir.

Q. He said he told you he was afraid to do it unless you would get something to push the wedge under, that you would not let him do it.

34 A. I don't remember if he told me he was afraid. I cannot remember that, if he told me he was afraid or not. I don't remember that.

Q. Just state in your own way, Mr. Davis, to the Court and the jury just how this happened, what you saw of the accident, how the accident happened, and what you were doing, and what was said?

A. Well, we had a block that measured about six or seven feet long to from four or five feet wide, and somewhere in the neighborhood of six inches thick, six or seven inches thick, something like that, and we wanted to raise that block up to put a chain right around the middle of it, and the rock was pitched about that much (illustrating with book), and then we were taking a crow-bar and bracing it up, we did not lift it, we only braced it up, and he pushed a small wedge in first, so that it would be high enough to start the big wedge, then he puts the big wedge in, right under the middle of the block, so that the two sides would be up level, so that we could put the chain around it, and then when he did that, there was a catch on the block—we did not know that, and then as soon as we lifted it up, then the catch came, and the block fell down and it rolled the stile around,—it was not a stile, but it was exactly the same,—it rolled down on his arm, and that is all I could say about it.

By a Juror:

Q. What do you mean by a catch? Do you mean there was a hump on the rock?

A. The catch had been inside there, you know, and we did not know about this catch, until when we lifted it up. Something like a split, in the rock, you know.

By Mr. Prichard:

Q. What do you mean by a catch? I do not quite understand?

By the Juror:

Q. A break in the stone?

35 A. A step in the split, something like when we split it, you know.

The Court: The split was not straight. There was a step in it.

Mr. Prichard: I see.

Cross-examination.

By Mr. Smith:

Q. Mr. Davis, you handled rock before that had catches in, hadn't you?

A. Sir?

Q. This frequently happened, that there were catches in rocks?

A. Oh, yes.

Q. And you and your son were there at the rock when the stile was put in this wedge?

A. Yes, sir.

Q. You were right there?

A. Yes, sir.
Q. And you used the crow-bars?
A. Yes, sir.
Q. To pry up the rock far enough so that the wedge could go in?
A. Yes, sir.
Q. And you told him to put the wedge in?
A. Yes, sir.
Q. And you saw that he was using his arm, did you not? You saw that he was pushing it in?
A. Yes, sir.
Q. And you had called him over from the rubbish, from his loading the rubbish? He was loading the rubbish, was he not?
A. Yes, sir.
Q. And you called him over, when you were ready to put this wedge under, because you needed his assistance. Isn't that so?
A. Yes, sir.
36 Q. And then you called him over, and there was no stick there to push it in, was there?
A. I did not notice of any. There was no stick there in purpose to put it in.
Q. "There was no stick in purpose to put it in." Do you know that they ordinarily use a stick to push it in?
A. Sometimes they will, especially if you go too far when you put your hand in, sometimes you take a shovel handle.
Q. You say that you saw him putting his arm in?
A. Yes.
Q. Did you tell him to take it out?
A. No, sir.
Q. You did not tell him to take it out?
A. No, sir.
Q. What was the size of the rock? I believe you described it, about six feet long and five or six feet wide. Is that so?
A. Four or five feet wide.
Q. Six or seven inches thick?
A. Yes.
Q. And it was very heavy? This was rather a large block, was it not?
A. Oh, no; that was not a very large block. It weighed about ten or eleven hundred. Something like that.
Q. Ten or eleven hundred?
A. Yes, sir.
Q. What was the character of the top of the rock? Was it square, or was it long, or was it large, or was it irregular? Did it have a bend to it?
A. Yes. One side was longer than the other.
Q. One side was longer than the other?
A. There was a corner off one side of it.
Q. And you did not have the chain around yet when this happened?
A. No, sir.

37 By a Juror:

Q. Do you only use a stick to shove it in when you cannot reach it with your arm?

By Mr. Smith:

Q. One of the jurymen asks whether you only use a stick to shove it in when you cannot shove it in with your arm, and I will ask you this additional question now, was the stick used for safety?

A. That stick was used,—sometimes they get in their hand, and they will push it, to start it, and then they take a stick, if they get it handy.

Q. Was it always used for safety,—the stick?

A. No, sir.

Q. Not for safety?

A. No, sir.

Q. Was there any danger at all in using the arm?

A. Not always.

Q. But sometimes?

A. Sometimes.

Q. When was there danger, and when was there no danger in using the arm?

A. We could not say that, you know.

Q. That you could not say?

A. No, sir.

Q. What was generally used there? The stick, or just the hand?

A. Well, some used the stick, but not often, you know.

Q. Not often?

A. Most of the time they used the hand.

By a Juror:

Q. What degree was the pitch at the bottom where this rock laid on, and how far was the drop down over this pitch?

By Mr. Smith:

Q. Do you understand the juror's question?

A. Yes, sir. The pitch was about that much in the rock (indicating).

38 By the Juror:

Q. About 10 degrees?

A. I could not tell you that. I never measured it. I just judge.

By Mr. Smith:

Q. How far was it dropped?

A. There was no drop at all.

Q. There was no drop at all?

A. No, sir; no drop at all.

By the Juror:

Q. It dropped back on the pitch after it was raised up?

A. Yes. There was no drop at all. It was up—this block was right on the bottom of the quarry. There was no drop at all. Only this block rolled down, and the stile rolled down on the block, and then the block slid down and caught his arm.

By Mr. Smith:

Q. Do I understand you to say that the stile rolled down with the block?
A. Yes, sir.
Q. So that the stile turned over?
A. Yes, sir.
Q. That is, the stile was put in upright?
A. Yes.
Q. As we had it here?
A. Yes, sir.
Q. So that we understand this, this stile was put in like this (illustrating), and then when the rock started to pitch——
A. Bring it up here. It was not so heavy as this one.
Q. It was not so heavy?
A. No, sir. They generally get a pitch like that to hold it in like that (illustrating). This would be the top and this would be the bottom. Then, after the block slid down, it rolled like this on him, you know.

39 By a Juror:

Q. There would be an angle to this stone? You put it in from the top?
A. No, from the side.
Q. How far was it from here (indicating), where this piece was broken off, down here to the solid piece? How far was the slit down in there (indicating)?
A. It was right on the solid piece, right on the bottom of the quarry. Then it dropped. Only we pitched it in like that, you know (illustrating). Then when it slid down, this rolled here, and caught his arm.

By Mr. Smith:

Q. Did they have a special stick or shovel at all?
A. No, sir.
Q. Do they have in other quarries a special stick or shovels?
A. Where I worked there was a stick there. You take the handle so (illustrating). That slid over. It slid by. This is a little too heavy to push here. It slides all the time.
Q. What kind of a stick? Did that stick you speak of have a prong in there, so that you would catch the stile at the back, and shove it just as you wanted it?
A. Yes, sir; and I saw a stick like that in quarries, too.
Q. You saw a stick like that, too?
A. Yes, sir.
Q. Did this quarry have a stick like that?
A. I did not notice none there.

Q. In how many quarries did you use this stick?
A. In one quarry.
Q. In one quarry?
A. Yes, sir.
Q. What did you see in the other quarries?
A. Just the same. I did not work only in three quarries altogether.
Q. What did they have in those three quarries?
40 A. In one quarry they had sticks that I worked in, and in the others it was the same as this quarry.

Mr. Prichard: The same as in this quarry.

By Mr. Smith:

Q. Do you mean the same as those in this quarry?
A. Yes, just the same as in this quarry.
Q. In this quarry you used the shovel at times?
A. Yes, sir.
Q. And did you ever use the hook?
A. To push it?
Q. Yes.
A. They do sometimes. They have got a hook there to pull the chains?
Q. That is the hook I mean. The hook to pull the chains, to pull them through. Was that ever used to push it in?
A. Yes, sir; you might as well when you could get one. They ain't got them with every rope there.
Q. It was not there at every rope.
A. No.
Q. Did they have a hook at this place that day?
A. I don't remember that I saw it.
Q. You don't remember that you saw it?
A. No, sir.

Redirect examination.

By Mr. Prichard:

Q. Mr. Davis, you and your son were each using crow-bars?
A. I don't understand that. I don't hear very good.
Q. At the time of the accident you were lifting with a crow-bar?
A. Yes.
Q. And your son was lifting with a crow-bar?
A. Yes.
Q. Was this wedge between the two crow-bars?
41 A. No, it was not between the two. I was in the end of the block and my son was on the corner, and he was to that upper side with his crow-bar.
Q. That is, your son was between you and Fillippon?
A. Yes, sir.
Q. Had this method of wedging blocks been used all the time that you were there in this quarry?
A. Yes, sir.

Q. How long had you been there?
A. About three years.
Q. And you were there, therefore, all the time that the plaintiff was there—you were there all the time that Mr. Fillippon was there?
A. Yes, sir.
Q. And the method of wedging blocks was the same during all the time that Mr. Fillippon was there?
A. Yes, sir.

WILLIAM DAVIS, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Are you in the employ of the Albion Vein Slate Company now?
A. No, sir.
Q. You were at the time of the accident, were you not?
A. Yes, sir.
Q. You were helping your father there?
A. Yes, sir.
Q. You were one of the quarrymen?
A. Yes, sir.
Q. Just tell the Court and the jury in your own way just what you saw of this accident and how it occurred.
A. Well, I was working as a helper. I was helping my father at this time that the accident happened. I was working there,
42 helping my father. I was working on a piece there with my father. A piece of rock was there. So we had to raise the split in the stone. We started it up, in order to get the chain around, and we had crow-bars to start it up. We had started it first, used a wedge to put under that bar, in order to raise it up. Then after you get this here started in, about so much (indicating with hook), we would put our hammers down, under our bars. After we got this thing up, we had to get it far enough, so that we could get the chain around. So after we got it in, he (plaintiff) pushed it in with his hand, and the block started to slide off, and it ran on his arm.
Q. How near were you to your father?
A. The block was only about six feet long.
Q. And were you next to your father, or was Fillippon between you and your father?
A. I don't quite remember whether I was next to him, or whether he was in the middle, between us.
Q. Did you hear Fillippon say that he was afraid?
A. No, I did not hear that.
Q. Did you hear him ask your father to get something to push the wedge in?
A. No.
Q. Or ask your father to allow him to get something to push the wedge in?
A. Not that I heard. I did not hear it. I did not hear it.
Q. And you were certainly within four or five feet of your father? You were within four or five feet of your father, were you not?
A. I must have been. I was right there to one side of the block. We could not be far apart.

Cross-examination.

By Mr. Smith:

Q. Mr. Davis, weren't you on the same side of the block with Mr. Fillippon?

A. Oh, yes.

43 Q. I understand the order, then, was this. Fillippon was at the point near where the block was raised on the bed or surface?

A. It was right on the bed.

Q. Exactly, but he was at that end, and was pushing it in, he was putting the stile in at that point. Is that correct?

A. Yes.

Q. Then, who stood next to him?

A. I don't remember whether it was father or I. I believe I stood next to him.

Q. You believe you stood next to him?

A. Yes.

Q. And then next to him was your father?

A. Yes.

Q. All on the same side?

A. We were all on the same side of the block.

Q. And how far were you away from Fillippon?

A. Oh, I don't know. We were right close together.

Q. Did you see him put his hand in?

A. Yes, sir.

Q. And did you see him when he started this stile—that is, when he started to put the wedge in?

A. Yes.

Q. And did you see him put it all the way in?

A. Yes, sir.

Q. Did you tell him that he should not do that?

A. No, I did not tell him nothing.

Q. You told him nothing?

A. I did not say anything.

Q. You did not say anything?

A. No, sir.

Q. And did you *see* your father say anything to him, that he should not put his hand in there?

A. No, sir; I did not hear him say anything.

By the Court:

Q. Did you hear him say that he should push it in?

44 A. He called him over to push it in.

By Mr. Smith:

Q. He called him over to push it in.

By the Court:

Q. He called him over there for that purpose, but what did you hear him say, if anything, at the time he was putting the wedge in?

A. He did not say anything to him. He had to put it in far enough so that it would raise up high enough to get the chain around.
Q. Did you hear him tell him how he should put it in, whether to use a stick, or his hand?
A. No, sir.

By Mr. Smith:

Q. Did you hear your father tell him to push it in?
A. I heard him say he should put the stile in.
Q. He should put the stile in?
A. Yes, sir.

By the Court:

Q. That is the time he started to put it in?
A. Yes, sir.
Q. While he was putting it in, did he say anything to him?
A. I don't remember whether he said anything to him at that time or not. After he had it started I don't know whether he said anything to him after he had the stiler started.

HARRY HOOPER, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you reside?
A. Pen Argyl.
Q. Are you in the employ of the Albion Vein Slate Company?
45 A. Not today.
Q. Were you in the employ of the company?
A. At that time, yes, sir.
Q. At the time of the accident?
A. Yes, sir.
Q. What was your position?
A. Taking out blocks.
Q. What, if anything, do you know about the warning to this plaintiff Fillippon or other employees of the company as to the danger of putting an arm in under the stone?
A. What is it you say? I do not hear so very clearly.
Q. Did you ever warn Fillippon himself about the danger of putting his arm under the rock?
A. Yes, sir.
Q. When?
A. When he worked on the rope where I did.
Q. How long before the accident was that?
A. I could not positively say to the day or two, but maybe a week or a couple of weeks before that.
Q. Won't you tell the Court and Jury just what you said to him and just what occurred?
A. Yes, sir. When he worked with me, I used to tell him to take a stick or a shovel handle or a piece of iron that was on the hook, to

shove it in. Of course, you always have to take your hand first to get it started, but after you get it so far, then you take this piece of wood or hook to shove it under, to keep from catching your hand. Of course, the boy was always willing and quick about his work and he wanted to do it quick, you know, and I used to make him take the hammer or the shovel, or something, to shove it in, for fear this thing would catch him, because I have seen this thing done before in my experience in working in the quarries and he would say, "Me no afraid." He would say he was not afraid, you know.

Q. Do you remember the occasion that you pulled him back?

46 A. Yes, sir.

Q. Just tell the jury what occurred then?

A. Well, there was a rock pitched away from the bank. Of course, you have got to go under the bottom, to raise it. It is like a pitch there, and in order to get the block up, you have got to raise under there, put this iron under, and he was in front of this stone, with the rock pitching, and I told him he should get up, and I took him by the hair of the head and I said, "You get up out of there or you will get caught one day." He said, "Me no afraid." I said, "When you get caught it will be too late in the day. You had better be careful." Of course, he got up.

Cross-examination.

By Mr. Smith:

Q. What was your position at the quarry?

A. Taking out blocks.

Q. Did you have the same position at this quarry which Mr. Humphrey Davis had?

A. Yes, sir.

Q. Just exactly. And you told him that he should not put his hand in there, didn't you?

A. Yes, sir.

Q. In fact, you say that you caught him by the hair one day and pulled him back and said that he ought to use a stick or something?

A. Yes, sir.

Q. And did you know that this was dangerous?

A. Yes, sir.

Q. What is that?

A. Yes, sir.

Q. And did you discuss this danger with other block men at any time? Did you talk about this danger with Humphrey Davis at any time?

A. I did not.

Q. You did not?

A. No, sir.

47 Q. But this was so dangerous, was it not, that everybody knew about it, that this was dangerous to put a stile in with the hand?

A. Yes. It is done every day. You have got to take it up with your hand, to put it in.

Q. To start it?
A. Yes, sir.
Q. And when you get it under the block, everybody knew, it was a matter of common knowledge that that was a dangerous piece of business?
A. Of course, where the rock pitches. A man does not always think so far, you know.
Q. You mean to say that it was not necessarily dangerous, but it might be dangerous?
A. Well, there is such a thing as that rolling over, you know.
Q. If it does not roll over, it is not dangerous at all?
A. It is all right if the block does not go over and does not slip.
Q. If it rests stationary, if it remains stable, then there is no danger?
A. It is all right then.
Q. But it also differs with the size of the block, does it not? If a block is large, it is much more dangerous that if it is a small block?
A. Yes, sir. It is apt to come down, maybe, on the pitch of the rock.
Q. But the danger of injury is not as great with a small block as it is with a very large block. Isn't that self-evident?
A. That is so, I believe, yes, sir. I should judge so.
Q. That is so?
A. Yes.
Q. You did not know whether there was any stick or hook there at that place, that is, at Humphrey Davis' place, that day, to push this in, did you?
48 A. Well, there would be a hammer or a shovel which he could have done it with.
Q. But whether there was a hammer or a shovel there——
A. He could have done it with that, I suppose.
Q. He could have done it with that?
A. Yes.
Q. Is there any increased danger when a block is on an incline than when it lies level?
A. Well, I should judge it is more safe when it is level than when the rock is pitched, because if you get under the stone to raise it the bar or something might come toward you, down over the hole.
Q. What would your answer be to my question, then? Is it more dangerous if there is an incline?
A. Yes, I should judge there was.

Redirect examination.

By Mr. Prichard:

Q. Mr. Smith asked you about the method. Everybody in the quarry knew, did they not, that if your hand was under the block, and anything happened, that your hand would get crushed?
A. That was just the thing that would happen unless it was big enough to keep from getting your arm under.
Q. Unless the wedge was big enough so that it would not come down far enough to crush your hand?

A. Yes.

Q. And if you did not put your hand under it could not get crushed?

A. No, sir; not very well.

DAVID STODDARD, having been duly sworn, was examined and testified as follows:

By Mr. Prichard:

Q. Where do you live?

A. Bangor, Pennsylvania.

49 Q. What is your connection with the Albion Vein Slate Company?

A. I am its president.

Q. You are the president of the company?

A. Yes, sir.

Q. Can you state in a general way the method of taking out this slate?

A. Yes, sir.

Q. Will you do so?

A. It has been pretty generally described. When a blast is made they want to raise a block, to put a chain in, one or two or more, as the case may be. They will take a stile like this, and put it in, when they get the block up just a little ways, until they get the stile in. Then they push it in as they raise it up, pushing the stile in. They push it in. There is no danger to the hand until the stile is placed in under the block. Then it is general knowledge that a man who puts his hand under the block, either in the quarry, or in the mill work, is in danger.

Q. What methods do they use to push it in when it gets up so far that they cannot push it without putting the hand in?

A. The common thing is to use the hook that is used to pull the chain in after the stiler gets in. Sometimes a shovel is used. Sometimes a bar is used. Sometimes a piece of wood. A piece of wood is used. They push it under the block, because it is general knowledge that when a man gets his hand under a block, under any circumstances, that it is unsafe. That is why we have the hook to pull the chain. The hook is pushed through from one side, I mean the hook on the chain is pushed from one side, along as far as possible, and then another hook is used to reach in and get it, so as not to put your hand in under the block. It is very dangerous, because if they happen to have a joint running through here, and a man has his hand under here, there might be a joint running straight through here, and it might crush his hand.

50 Q. From your knowledge and experience state whether or not the hands are used for that work?

A. No, sir; no man would ever think of directing a quarryman to put his hand under the block under those circumstances, or in any other way.

Q. How long have you been the president of this company?

A. I was going to say from its inception, but I would say eight years I have been the president of this particular company.

Q. Has this method been pursued all the time you have been there?

A. Oh, yes, sir; it has been pursued for thirty years.

Q. Have you ever known of a man getting his hand crushed?

A. In my thirty years' experience, I have never known of a man getting crushed by the use of a stiler.

Q. Have you examined your records to see what the average earning of Fillippon was?

A. Yes, I have the records here to show what he earned last year. The average would be—I could not tell you offhand—but he earned $435 last year.

By the Court:

Q. That is, previous to his injury?

A. Yes, sir.

A Juror: Do they have orders that no man is allowed to put his hand in?

By Mr. Prichard:

Q. Do you have orders that no man is allowed to put his hand under the block?

A. Yes, sir; those are general orders.

By a Juror:

Q. Did you ever discharge a man for doing that?

A. I cannot say that I have, but I have threatened them I presume one hundred times.

51 Q. Did you ever discharge a man for refusing to do it?

A. No, sir.

By another Juror:

Q. How did it come that Mr. Davis testifies they did not have this hook at this particular gang?

A. The rope passes over a certain amount of rock from, we will say, the north to the south of the quarry. That rope will go along and pick up rock in a certain space. Then there are about four hole men in that space, along. Then the rope next to that will pick it up. Maybe that is twenty-five to fifty feet. While they all have these hooks, at that time it might have been ten or fifteen feet away from him, when he did this, but it would be there. They are all over. It could not be other than there. It would belong there just as much as the stiler would.

By another Juror:

Q. Do the men in charge of the lifting of the slate get paid by contract or day's wages?

A. Well, they are paid by day's wages, but sometimes we guarantee that they shall reach a certain amount.

Q. A certain amount of production has got to be done?

A. No, not those men. We guarantee that their wages shall not be less than so much.

Cross-examination.

By Mr. Smith:

Q. Was Humphrey Davis paid by the day or by the quantity that he got out?

A. He was paid—he is one of the men—this particular man that was hurt did not come under that class. This man was paid $1.80 a day.

52 By a Juror:

Q. He was a day man?

A. Yes, sir.

By Mr. Smith:

Q. Humphrey Davis is the man the juror asked about. How was Humphrey Davis paid?

A. Humphrey Davis was paid by the day, but he was guaranteed to have so much, and I think an extra 30 cents a square, or something, I guess maybe 30 cents a square might have been Humphrey Davis'. Sometimes they do it one way and sometimes they do it another.

Q. But, now, come right down to the point. Do you know or don't you know that Humphrey Davis was paid so much per day, and then in addition he was to receive a commission on what he got out?

A. Now, I would rather you would ask Mr. McKennan that question. He knows absolutely about that, and I don't exactly know about it.

Q. But I have asked you about it.

The Court: He says he does not know.

The Witness: I would not like to say positively.

By Mr. Smith:

Q. Let me refresh your recollection. Wasn't he paid thirty-three cents a square?

A. Yes, it is possible that he was. I know we have done that, but that would not take effect on the laboring men.

Q. That is all I wanted to know, whether he was not paid by the square.

Defendant closes.

Testimony closed.

53 *Charge of the Court.*

Hon. Charles B. Witmer, J., specially presiding.

GENTLEMEN OF THE JURY: The plaintiff, Donatto Fillippon, is in this case seeking to recover from the defendant, the Albion Vein Slate Company, certain damages for personal injuries which he claims to have sustained by reason of an accident occurring to him while in the employ of the defendant company on or about the 31st day of July, 1914.

The plaintiff is a citizen of Italy, although at present residing in this country, and the defendant is a corporation of the State of Pennsylvania; hence by reason of such diverse citizenship, the case has found its way into this court.

By way of preface or introduction, let me suggest that this is an important case to the parties, the plaintiff and the defendant, and it should not be decided with a view of dispensing charity. Strong appeals have been made to you by counsel regarding their clients, all of which can only have possible relevancy before a jury to induce it to come up to the full measure of its duty, and to give the case the best and highest consideration of which it is capable. Whether the parties before you, on the one hand, as appears to be the case of the plaintiff, is poor, and a foreigner, and on the other hand a corporation with some possible means, should not concern you whatever, or be held or considered to weigh for or against either one of the parties. You are sworn to try the case according to the law and the evidence, and I want to remind you that in a court of justice before a jury all persons, of whatever character or description, are equal. Therefore, you will, I know, dispose of this case according to the law and the evidence and base your verdict on nothing else. The evidence you have from the witnesses, of whose credibility you will be the judges,

54 and as to the credence or confidence to be placed on what they have said, or the extent to which they are to be trusted, you may take into consideration, and you ought to take into consideration, their interest in the ultimate result of the case, and their demeanor on the stand while testifying. The law of the case, as a guide to a just conclusion, you will receive from the court. You alone are responsible for the facts of the case as you find them to be in the light of the instructions that you receive in regard to the law. With these few preliminary admonitions and instructions, I will ask you to consider the case.

It appears that at the time of the accident the defendant company was engaged in the business of mining and quarrying slate and slate products, and in fact did operate a slate quarry near the Borough of Pen Argyl, in the County of Northampton, this State, and the plaintiff was then, and for some time prior to the accident, in the employ of such company as a rubbish hand, the duties of which consist of loading boxes preparatory to hoisting the same out of the quarry, and, furthermore, to assist as such hand in raising blocks of slate or material used in the manufacture of slate and slate products as the same was being quarried and detached from the place which it was obtained, by placing or slipping under such blocks of slate an iron

wedge of the character as here offered in evidence. Upon the particular day in question, while a piece of block of slate of considerable size was being lifted or raised from its bed so as to adjust the necessary chain or instrument by which it could be removed, as desired by those operating the quarry, the plaintiff in attempting to place or slip under it the iron wedge, while others were raising the block with bars or levers, was caught in the attempt of so doing, resulting in the injury of his right arm, necessitating the amputation of the same near the shoulder.

Regarding the character of the injury you will have no difficulty, since you have seen the plaintiff's arm and heard the testimony of the witnesses produced, which is hardly disputed.

55 The important question is as to how the accident occurred, and whether or not the defendant should be held liable for the same.

The master assumes the duty toward the servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work; and it is furthermore the duty of the master to give the servant proper instructions so as to enable him reasonably to guard and protect himself against danger while in the discharge of his duties. If the master fails in doing this, and the servant or employee is injured, and without fault of his own, the master is liable in damages. And, furthermore, whenever the master delegates to any officer, servant, agent or employee, high or low, the performance of the duty which really devolves upon the master himself, then such officer, servant, agent or employee stands in the place of the master and becomes a substitute for the master and the master is liable for his acts or negligence, if he is guilty of any.

The questions, therefore, presenting themselves to you in this particular case are first: Did the master, the defendant in this case, through one Humphreys Davis, direct and instruct the plaintiff to reach under the block of slate, about to be lifted and there to place the iron wedge in manner as testified by the plaintiff? And, second: If so, was it reasonably safe to do so under the circumstances? And, third: If not, and resulting in the injury to the plaintiff, was he free himself from contributing to the injury? Regarding the first proposition I will say to you that if you believe the testimony of the plaintiff, that Humphrey Davis had charge and supervision of the work in and about the place where the plaintiff was working, that he had authority to direct how the work was to be done, incident and pertaining to the lifting and moving of the stone from the bed of the quarry at the point in question, you would be justified in

56 finding that he was such agent, acting for and on behalf of the defendant company, whereby the defendant became bound by his acts and conduct, and if you so find, you will then determine whether or not he took every reasonable precaution to protect the plaintiff while he was engaged in and about his employment. If you find that Davis had no such authority from the company, or that he did not direct the plaintiff to do that which was not reasonably safe under the circumstances, while so engaged at his work, you need not carry your investigation any further, and find a verdict for the defendant. Regarding this matter I will ask you to consider all of the evidence before you, the character of the employment, the posi-

tion of the block of slate at and before it slipped and fell on the plaintiff's arm, and the circumstances and conditions attending the injury. If, however, on the other hand you find that Humphrey Davis was acting with authority and he did direct and instruct the plaintiff to place himself in a position where it was not reasonably safe in order to do the work in which he was engaged, having in mind the particular position of the block of slate at the time, and although the injury to the plaintiff resulted from such negligence on the part of the defendant through its agent, Davis, you must be satisfied that the plaintiff himself acted as a reasonably prudent man would under the circumstances.

I want to say to you also that when a man accepts employment he assumes also with it the ordinary risk incident to such employment, and if you find the circumstances or situation in which the plaintiff found himself at the time of the accident, or that his performance leading up to the injury was of ordinary occurrence, then you may conclude that he had assumed the risk of the accident that has befallen him, and he cannot recover; but on his part it is contended that the situation in which he found himself at the time when
the stone or slate block, properly speaking, was suspended or
57 lifted by the men, was of an extraordinary character, that
the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act by the foreman, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted. Now, if you find the facts as contended for by the plaintiff, I will ask you to say whether he was guilty of contributory negligence under the circumstances. Could he have protected or saved himself by the use or exercise of ordinary care? If he is to blame in part, or has in any manner contributed to his injury, he is not entitled to your verdict. The rule in negligence cases is, that while the defendant is held to exercise due and reasonable care under the circumstances, the plaintiff is also held to exercise the same degree of care, and if he does not do so, he cannot recover. Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous. If the danger was imminent that faced the plaintiff, and he in the face of it did the thing that he knew, as a reasonably careful man, under the circumstances, was dangerous, he is guilty of contributory negligence and cannot recover.

With this explanation I will leave you to apply these principles to the case in hand and determine whether the plaintiff ought to recover. If you conclude that he is not entitled to your verdict, you need not proceed further with the case. If, however, after weighing all the evidence in the case, you find on all three of these propositions which I have submitted to you in favor of the plaintiff, always remembering that it is the duty of the plaintiff to satisfy you by the
weight or preponderance of the evidence upon any and all of
58 his contentions, you will then proceed to determine the
amount to which the plaintiff is entitled. And you should not infer from what I say upon this phase of the case any state of mind

of my own or any conclusion of my mind regarding this matter. It is my duty to instruct you as to the law pertaining to damages, so that you are informed if you should reach this part of the case.

If you conclude to find the defendant liable, the plaintiff is ordinarily entitled to any expenditure which he had in endeavoring to be cured, which in this case is eliminated for want of evidence on this point. He would be entitled to be compensated for the loss, if any, in earning capacity. In the first place, he would be entitled for any time already lost by reason of this injury in the value of wages he may have lost already up to this time. On this point you have the plaintiff's statement, saying that he used to earn while in the employ of the defendant $1.80 a day, and that he worked steadily at his employment, as you will recall. To what extent he has been injured and his earning powers reduced, I will leave to you to determine under all the evidence in the case, and the damage he has sustained you will fix accordingly, taking into consideration his age, his previous health and manner of living. He would also be entitled to compensation for the pain and suffering which he has endured by reason of his injury, and for any inconvenience and disfigurement on account of the loss of his arm, not being able to help himself as before. All of these matters you will take into consideration, if you find that the defendant company is to blame, and that he is free from such, and award him such damages as you think he ought to have, under the circumstances.

I trust that you will deal with this matter as reasonable men, reviewing and considering the case dispassionately, without allowing your sympathy to cloud your better sense and good judgment.

I am requested to charge you by the defendant on a certain
59 point. The point is denied, without reading it.

(The defendant's point, which was refused by the Court without being read, is as follows:

"Under all the evidence, your verdict must be for the defendant.")

(Exception noted for the defendant to the refusal of the Court to affirm the point presented on behalf of the defendant, by direction of the Court.)

Mr. Prichard: I desire to except to that part of your Honor's charge which sets forth the three questions which are for the jury in this case, first, did the Master, the defendant in this case, through one Humphrey Davis, direct and instruct the plaintiff to reach under the block of slate, about to be lifted, and there to place the iron wedge in manner as testified by the plaintiff? Second, if so, was it reasonably safe to do so under the circumstances? And third, if not, and resulting in the injury to the plaintiff, was he free himself from contributing to the injury?

(Exception noted for the defendant as requested, by direction of the Court.)

Mr. Prichard: I also desire to except to that part of the charge of the Court which said "But on his (plaintiff's) part, it is contended that the situation in which he found himself at the time when the stone or slate block, properly speaking, was suspended or lifted by the

men was of an extraordinary character, then the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted."

(Exception noted for the defendant as requested, by direction of the Court.)

The Court: Gentlemen, the case is in your hands.

60 Counsel for the defendant requested the learned Judge to direct the stenographer to reduce the testimony and charge of the Court to typewriting, and file the same of record in the cause, which request was granted, and the stenographer was so directed.

After the jury had retired to their room the following question was propounded to the Court by them for answer:

"Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under.'"

And answered by the Court as follows:

If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence.

PHILADELPHIA, PA., Monday, November 27, 1916.

2 o'clock p. m.

Before Hon. Charles B. Witmer, J., Specially Presiding.

Present:

J. Willard Paff, Esq., representing the plaintiff.
Frank P. Prichard, Esq., representing the defendant.

61 Mr. Paff: If the Court Please, your Honor will no doubt recollect the trial of this case, and that after the trial of this case no exception or objection was made to any testimony, I do not think any objection was made on either side, and the plaintiff in this case did not except to your charge. We adjourned about 12 o'clock, or at the regular adjourning time. The jury went out to the jury room to deliberate and Mr. Smith and I came back a little after Court adjourned. We first went to the Clerk to see if the jury had come in. We found they had not. We came down to the office, and either Mr. Smith or myself was in the office of the Clerk until the jury came in and rendered its verdict, and it was not until later

in the day, when I came back to get a book of the Carlisle tables here, that I learned that an inquiry had been made to you by letter, and that that inquiry had been sent by a tipstaff or someone to the jury, without calling them in open court.

Now, if your Honor please, we are in a peculiar situation. We, of course, filed a bill of exceptions, but we do not have on the record anything more than that the inquiry was made to you and the reply that you made to the jury.

The Court: The reason I did not call the jury in at the time was because Judge Thompson was busy here trying a case, when that inquiry came in. The question was addressed to me while I was in chambers. Of course, I reduced my answer to writing, with instructions to make it a matter of record, so as to give you the advantage of any exception you may take.

Mr. Paff: Your Honor, in order that we may be protected in that regard, would there be any objection to our placing on the record the exact facts, because I find in looking over the cases in one or two of the cases that was not done, and when an appeal was taken, the parties found they had no standing in court at all, because the facts did not appear on the record. I could not find any practice in regard to that particular point. The case arose in 183 Pennsylvania,
62 a case I called your attention to, and I called Mr. Prichard's attention to it at the time I filed the motion. That was a Lancaster County case, and I wrote to one of the counsel who was still living in that case to ascertain how it had been brought up, and there it was brought up just as we have brought it up here on a motion, and as I recollect his letter—I do not have his letter with me—a notation was made on the record at that time, and the same thing occurred in a case in Ohio, 221 Federal, and I would like if the Court will permit me to place that on the record.

The Court: What do you propose? Do you have something prepared?

Mr. Paff: I had in mind this, to use the words that I have in my motion, and if there is any objection to them Mr. Prichard will call attention to it.

We move to have placed on the record at this time the following: After the trial Judge had completed his instructions and charge to the jury, and after the jury had retired for their deliberation, and while deliberating, the jury sent to the trial judge the following written inquiry, this written inquiry having been made after the jury had been deliberating for some time.

Is there any objection to that, Mr. Prichard?

The Court: That is true.

Mr. Prichard: If that is the fact, I suppose it is.

The Court: That is true. That is the fact.

Mr. Prichard: Then, of course, I have no objection.

Mr. Paff: The question is as follows: "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of con-

tributory negligence even though told by foreman Davis to 'push it under.'"

To which inquiry, in the form of a note, delivered to the trial judge, the trial judge sent the following written instructions
63 or reply to the jury room in the absence of the parties and their counsel, without the consent of the parties and their counsel, and without calling the jury in open court.

Is there any objection to that, Mr. Prichard?

Mr. Prichard: I do not think there is any objection to that.

Mr. Paff: The answer was as follows: "If he was told to put it under, as stated by the plaintiff, and he did so, fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him, and apparent, he is guilty of contributory negligence."

Now, will the Court permit us to note our exception, or will the Court note an exception for us at this time on the record?

Mr. Prichard: There is no objection on our part.

The Court: An exception is noted for the plaintiff.

And thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said plaintiff did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the plaintiff did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 3d day of November, A. D. 1916.

[SEAL.] CHARLES B. WITMER,
District Judge.

64 *Opinion.*

Filed Dec. 6, 1916.

Witmer, District Judge.

The reason assigned for a new trial has to do with a question and answer that passed between the Court and jury while the latter were deliberating. The jury retired shortly before the noon recess and not having reached a verdict when the Court resumed, Judge Thompson began the trial of a case in the room vacated by the trial Judge of the present case. While occupied in the discharge of his official duties in chambers, the jury presented to the Judge the written question, which was also answered in writing. The question and answer were returned by the jury and made a part of the record and are as follows:

Question: "Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under.'"

Answer: "If he was told to put it under as stated by the plaintiff and he did so fully appreciating at the time of the danger attending and having sufficient time to consider when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

While it is conceded that the practice here adopted does not deserve encouragement, however, under the peculiar circumstances of the case, there seems to be no reason why the course pursued was
65 not justifiable, rather than disturb the trial in progress to answer in open court a question that involved but a repetition of a legal principle; having answered in such a way as to enable the parties the opportunity of a review, their rights were as effectively secured as if the answer had been given in open court. And in this there was compliance with the prevailing rule that a new trial is not justified, unless some prejudice or disadvantage resulted to the parties thereby, which is not inferred where the communication is in writing, and the writing has been preserved, so that the instructions can be included in the bill of exceptions.

Shapley vs. Aaron S. White, 6 New Hampshire, 172; Buntin vs. Danville, 93 Virginia Reports, 213; The State of — vs. Smit, 20 Missouri Appeal Repts., 54.

In the case of Sommer vs. Huber, 183 Pa. 162, and others, where a new trial was allowed, the writing was not preserved thus bringing the case within the precautions exercised against giving oral instructions without reducing the same to writing in the presence of the parties, thereby rendering a review of such instructions practically impossible.

That the instructions given were in accordance with the law governing in the case, and that the manner in which the same were given worked no possible injury to the plaintiff remains to be the opinion of the Court. This motion is therefore denied.

Præcipe for Judgment.

Filed Dec. 21, 1916.

The Clerk will enter judgment on the verdict in the above entitled cause in favor of the defendant.

FRANK P. PRICHARD,
Attorney for Defendant,
Per J. W. BAYARD.

December 19th, 1916.

To William W. Craig, Esq., Clerk United States District Court.

66 *Judgment.*

Filed Dec. 21, 1916.

Before WITMER, *J.*

And now, to wit, this 21st day of December, 1916, in accordance with præcipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the defendant and against the plaintiff.

BY THE COURT.

Attest:
LEO A. LILLY,
Deputy Clerk.

Petition for Writ of Error.

Filed Jan. 18, 1917.

To the Honorable the Judges of the said Court:

Donatto Fillippon, plaintiff in the above entitled cause, conceiving himself to be aggrieved by the entering of judgment in favor of the defendant and against the plaintiff on the 21st day of December, 1916, hereby files his petition for a writ of error from such judgment, and prays that his petition may be allowed, and that a transcript of record and proceedings and papers upon which said judgment was entered, be authenticated and be sent to the United States Circuit Court of Appeals for the Third Circuit.

SMITH, PAFF & LAUB,
Attorneys for Plaintiff.

67 *Order of Court.*

Filed Jan. 18, 1917.

Before Witmer, J.

And now, to wit, this 18th day of January, 1917, it is ordered that the prayer for a writ of error be allowed.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Assignments of Error.

Filed Jan. 18, 1917.

Now comes the defendant in the above entitled cause and files the following assignments of error upon which he will rely upon his prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the Sixth day of December, A. D. 1916.

First. The learned Court erred in that while occupied in the discharge of his official duties in Chambers, after the jury had retired to deliberate, the jury forwarded to the Judge the following written question in the absence of counsel and the plaintiff, and not in open Court:

Q. Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under',"

to which written inquiry, in the form of the note delivered to the trial Judge, the trial Judge sent the following instructions to the jury room in the absence of the plaintiff and his counsel, and not in open Court:

"A. If he was told to push it under as stated by the plaintiff
68 and he did so fully appreciating at the time the danger attending, and having sufficient time to consider, when he was face to face with a situation, this would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

Second. The learned Court erred in its instructions to the jury in answer to the inquiry of the jury as follows:

"Q. Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence even though told by Foreman Davis to 'push it under'.

"A. If he was told to push it under as stated by the plaintiff and he did so fully appreciating at the time the danger attending and having sufficient time to consider when he was face to face with a situation, this would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

Third. The learned Court erred in privately communicating with the jury in the absence of the plaintiff and his counsel, and not in open Court.

Wherefore, the appellant prays that the said decree be reversed, and that the said District Court for the Eastern District of Pennsylvania be ordered to enter a decree reversing the decision of the lower court in said cause.

SMITH, PAFF & LAUB,
Attorneys for the Appellant.

69 *Præcipe Sur Transcript of Record.*

Filed Jan. 18, 1917.

To the Clerk of the United States District Court, Eastern District of Pennsylvania:

In making up the transcript of record, sur writ of error, in the above entitled case, you are to include the following papers:

Docket entries,
Writ of Error,
Statement of Claim,
Plea,
Bill of Exceptions,
Order refusing motion for new trial, &c.,
Præcipe for Judgment—Judgment,
Petition for Writ of Error,
Assignments of Error,
Clerk's Certificate,
and no others.

SMITH, PAFF & LAUB,
Attorneys for the Plaintiff.

70 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of Donatto Fillippon vs. Albion Vein Slate Company, No. 3636 March Sess., 1915, as per præcipe filed, a copy of which is hereto annexed, the transcript of record is to include and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 25th day of January, in the year of our Lord one thousand nine hundred and seventeen and in the one hundred and forty-first year of the Independence of the United States.

[SEAL.]

WILLIAM W. CRAIG,
Clerk District Court U. S.

71 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223.

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

And afterwards, to wit, on the sixteenth day of March, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs before the Hon. Joseph Buffington, Hon. John B. McPherson, and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the seventeenth day of May, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

72 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223.

DONATO FILLIPON, Plaintiff Below,

vs.

ALBION VEIN SLATE CO.

Error to the District Court of the United States for the Eastern District of Pennsylvania (Judge Witmer, of the Middle District, Specially Presiding).

Before Buffington, McPherson, and Woolley, Circuit Judges.

McPHERSON, *C. J.*:

The plaintiff, an adult subject of the King of Italy, suffered injury while at work in the slate-quarry of the defendant, a Pennsylvania corporation. He was a rubbish hand or ordinary laborer, and this had been his occupation for more than a year. The defendant's quarry was operated by gangs, each gang comprising four block-men, and (at the time of the accident) one rubbish hand. The quarry is an open hole from which the rough blocks of slate are hoisted to the top of the ground by ropes or chains. After a block has been blasted out, it is tilted up by crowbars and by wedges of iron or wood so that the hoisting tackle may be fastened around it. Under small blocks the wedges are placed by the hand, which need
73 not go farther in than the edge of the block; under large

blocks, the wedges are pushed part of the way by the hand, and then a stick of some kind is used to push the wedge farther in, the workman being thus protected from injury in case the stone should slip or make some other unexpected movement. A rubbish hand is a general utility man and is expected to do whatever the foreman of the gang may direct. The plaintiff's experience had made him familiar with the work just described. His account of the accident was as follows: On July 31, 1914, a large block, several feet both in length and in breadth, had been blasted out and chains were about to be put around it. He was helping, and had inserted a wedge as far as possible without putting his hand under the stone. But the wedge had to go farther, and he was afraid to use his hand for that purpose, telling the foreman that he wanted to get something to push the wedge. Instead of consenting, the foreman ordered him to "Go ahead, go ahead," and he thereupon put his right arm under, the result being that the arm was so badly crushed by the sudden movement of the block that amputation was necessary. The court asked the jury to decide, whether the Company had been negligent, and whether, in view of the plaintiff's testimony that he was merely obeying the foreman, his obedience was excusable—in other words, whether he fully understood the danger and acted with reasonable care.

The plaintiff took no exception to the charge, the jury retired, and the court adjourned for the noon recess. After the recess the courtroom in which the trial had been held was occupied by another judge and another case, and Judge Witmer retired to his chamber. While the other case was proceeding, the jury sent a written question to Judge Witmer concerning the applicable rule of contributory negligence, and the judge returned a written answer. The question and answer were both preserved on the record, and the plaintiff was afterwards allowed an exception to the instruction thus given and also to the manner of giving it. The manner was objected to, on the
74 ground that the question was asked and answered in the method described, not in open court, in the absence of the parties and their counsel, and without their knowledge or consent. The verdict was for the defendant.

We need not discuss the question and answer themselves; they contain nothing of which the plaintiff can properly complain, the answer being slightly more in his favor than the charge itself. The point chiefly insisted on now is the alleged error in failing to give the instruction in open court. Upon this subject the federal courts have not yet passed, as far as we know, but numerous cases have arisen in the state courts and have resulted in two divergent lines of decision. The authorities are collected in a note to North Dakota v. Murphy, 17 L. R. A. (N. S.) 609 (1909), and we see no need to add a prolonged discussion to the 50 or more opinions already in the books. Numerically, the opposing cases are fairly equal, and in weight of argument also there is little to choose between them. The decisions that follow the earliest report—Sargent vs. Roberts, 1 Pick. 337—lay down the unbending rule that no communication should take place between a judge and the jury except in open court and (if practicable) in the presence of counsel; and some of them hold that communications of only slight importance will furnish ground for

reversal if they have been made in a different place and a different way. The other line of authorities accepts the rule as highly desirable but not as unbending, holding that the circumstances of each case should be carefully scrutinized in order to be sure that no harm has actually been done, and that no harm is likely to be done, by the kind of communication that may be under examination in a given case. In our opinion this is the better view, and we give it our approval, confining the decision to the situation now before us, namely, an ordinary civil (not criminal) case, where the jury has asked a plain question in writing concerning a matter of law, not a matter of fact, and where the judge has answered it in writing plainly and accurately, and nothing else has occurred—the question and answer moreover having been preserved of record, and counsel having been promptly informed of what has taken place, and having been given the opportunity of excepting to the substance of the instruction and to the manner of giving it. In the case in hand we think it plain that no harm was actually done, and it is not easy to see how harm is likely to happen under precisely similar circumstances, where a question of law only is propounded and is accurately answered. We do not say that harm could never happen in the exchange of such a question and answer; the variety and complexity of human affairs are so great that the same act may have a different quality if the atmosphere be different that surrounds it; but so far as we can see, harm is not probable. We agree fully that modifications of established practis- should be allowed with caution, and we see excellent reasons why every step in a trial up to the rendering of the verdict should be taken in open court, and (wherever practicable) in the presence of counsel also. But, after all this has been said, we are still brought to the question—Is there a compelling reason of policy why a trial fairly and accurately conducted must be always set aside where such an irregularity has crept in altho it has done no actual harm, and is unlikely to do harm?

We do not see our way to answer this question in the affirmative, and must therefore affirm the judgment.

Endorsed: No. 2223. Opinion of the Court, by McPherson, J. Received and filed May 17, 1917. Saunders Lewis, Jr., Clerk.

76 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223 (List No. 28).

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, May 17, 1917.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Endorsed: No. 2223. Order Affirming Judgment. Received and filed May 17, 1917. Saunders Lewis, Jr., Clerk.

77 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Donatto Fillippon, Plaintiff in Error, vs. Albion Vein Slate Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-eight day of May in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

78 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Donatto Fillippon is plaintiff in error and Albion Vein Slate Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

79 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

80 [Endorsed:] 2223. File No. 26,089. Supreme Court of the United States, No. 622, October Term, 1917. Donatto Fillippon vs. Albion Vein Slate Company. Writ of Certiorari. Received Oct. 31, 1917. Saunders Lewis, Jr., Clerk.

81 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2223.

DONATTO FILLIPPON, Plaintiff in Error,

vs.

ALBION VEIN SLATE COMPANY, Defendant in Error.

Stipulation of Counsel.

Whereas, the Supreme Court of the United States on the 15th day of October, A. D., 1917, granted a writ of certiorari in the above entitled case,

Now, October 27, 1917, it is agreed and stipulated by and between Frank P. Pritchard of counsel for the Albion Vein Slate Company and Calvin F. Smith of Smith, Paff & Laub of counsel for Donatto

Fillippon, that the certified transcript of the record on file in the Supreme Court of the United States be taken as a return to the writ of certiorari allowed as aforesaid in Donatto Fillippon, petitioner, vs. Albion Vein Slate Company, No. 622 October Term, 1917.

And that a certified copy of this stipulation sent up to the Supreme Court of the United States by the Clerk of the United States Circuit Court of Appeals for the Third Circuit shall be taken as his return to the writ.

Philadelphia, Pa., October —, 1917.

(Signed) FRANK P. PRICHARD,
Of Counsel for Albion Vein Slate Company.

(Signed) CALVIN F. SMITH,
Of Smith, Paff & Laub,
Of Counsel for Donatto Fillippon.

Endorsed: No. 2223. Stipulation of Counsel. Received & Filed Nov. 3, 1917. Saunders Lewis, Jr., Clerk.

82 UNITED STATES OF AMERICA,
Third Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Donatto Fillippon, plaintiff in error, vs. Albion Vein Slate Company, defendant in error, No. 2223, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Third Circuit, at office in the city of Philadelphia, Pennsylvania, this sixth day of November, A. D. 1917.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the United States Circuit Court
of Appeals for the Third Circuit.

83 [Endorsed:] File No. 26,089. Supreme Court U. S., October term, 1917. Term No. 622. Donatto Fillippon, Petitioner, vs. Albion Vein Slate Co. Writ of certiorari and return. Filed November 7, 1917.